LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 10 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1965

No. 1000

ELISE McK. MORGAN and
EDWIN MORGAN
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent

Petition for A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

RICHARD E. THIGPEN
RICHARD E. THIGPEN, JR.
ROBERT L. HINES
900 North Carolina National
Bank Building
Charlotte, N. C. 28202
Counsel for Petitioners

IN THE

Supreme Court of the United States

October Term 1965

No.

ELISE McK. MORGAN and
EDWIN MORGAN
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent

Petition for A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Statutes Involved	2
Statement of the Case	4
Reasons Why A Writ of Certiorari Should Be Granted	7
Argument Amplifying Reasons Why A Writ of Certiorari Should Be Granted	7-19
I	
The proper disposition of this case involves an important question of law and the administration of our tax laws which should be settled by this Court.	7
II	
The Tax Court has departed so far from the accepted and usual course of judicial proceedings and the United States Court of Appeals for the Fourth Circuit has so far sanctioned such a departure as to call for an exercise of this Court's power of supervision.	16
III	
Although there is no other decision by a Circuit Court of Appeals involving the issue in the Morgan case, notice of appeal to the United States Court of Appeals for the Tenth Circuit has been filed in a case which was decided in favor of the taxpayer on the same issue.	18
Conclusion	19

CITATIONS

Cases: **Page**

Bowers v. New York & Albany Lighterage Co., 273 U. S. 346 (1927) 14

Colony, Inc. v. Commissioner, 357 U. S. 28 (1958) 16

Commissioner v. Acker, 361 U. S. 87 (1959) 14

Commissioner v. Bilder, 369 U. S. 499 (1962) 16

Commissioner v. Brown, 380 U. S. 563 (1965) 14, 15

Commissioner v. Sternberger's Estate, 348 U. S. 187 (1955) 17

Gould v. Gould, 245 U. S. 151 (1917) 14

Hamm v. Commissioner, 325 F. 2d 934 (8th Cir. 1963) 18

Helvering v. Stockholm Enskilda Bank, 293 U. S. 84 (1934) 13

Ithaca Trust Co. v. United States, 279 U. S. 151 (1929) 17

Schwab v. Doyle, 258 U. S. 529 (1922) 13

United States v. Dickerson, 310 U. S. 554 (1940) 16

United States v. Gates, — F. Supp. —, 65-2 USTC ¶9654 (D. C. Colo. 1965) 18, 19

United States v. Merriam, 263 U. S. 179 (1923) 14

United States v. Zacks, 375 U. S. 59 (1963) 16

Statutes:

28 U. S. C. § 1254(1) 1

Internal Revenue Code of 1939, §101(6) 4

Internal Revenue Code of 1954	Page
Section 161	2
Section 170	2, 4, 8, 10
170(a)(1)	1, 2
170(b)(1)	10
170(c)	1, 2
Section 501(c)(3)	4
Section 2522	2, 3, 8
2522(a)(2)	2, 3, 4

Miscellaneous:

U. S. CONST. art. I, §1	10
CONF. REP. NO. 2632, 85th Cong., 2d Sess. (1958)	12
H. R. REP. NO. 775, 85th Cong., 1st Sess., 1958-3 CUM. BULL. 819	11
S. REP. NO. 2375, 81st Cong., 2d Sess. (1950)	9
S. REP. NO. 1983, 85th Cong., 2d Sess. (1958)	11
Treasury Department Release No. D-1494, Feb. 9, 1965	12
Treasury Regulations Section 20.2031-7	6
Section 25.2512-5	6

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

The Petitioners, Elise McK. Morgan and Edwin Morgan, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Fourth Circuit in the above case.

OPINIONS BELOW

The opinion of the Tax Court of the United States (App. 45-55)[1] is reported in 42 T. C. 1080 (1965). The opinion of the United States Court of Appeals for the Fourth Circuit reads in its entirety as follows: "Per Curiam: We affirm on the opinion of the Tax Court." — F. 2d — (1965).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was dated and entered on November 12, 1965. Jurisdiction to review the decision of the United States Court of Appeals by writ of certiorari is conferred upon this Court by 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

Petitioners created an irrevocable trust in 1958 and named their two adult sons as trustees. Petitioners gave to the trust stock in a corporation which they controlled. The trust provided that all of the net income had to be paid to charity for a period of twenty years after which the heirs of the petitioners became the beneficiaries of the trust. Charity had a vested estate for years in property worth $677,160. The questions presented on these facts are:

1. Whether the value of the twenty year income interest was deductible under Section 170(a)(1) and (c) of

[1] "App." designates references to the Appendix to the petitioners' brief in the Court below.

the Internal Revenue Code of 1954 as a charitable contribution.

2. Whether the value of the twenty year income interest was deductible under Section 2522(a)(2) of the Internal Revenue Code of 1954 as a charitable gift.

3. Whether the value of the twenty year income interest was ascertainable.

4. Whether the courts below erred in holding that the charitable contributions and charitable gifts were not deductible under Sections 170 and 2522 of the Internal Revenue Code of 1954 because "the charity may not receive the beneficial enjoyment of the interest" which "is not susceptible of valuation."

STATUTES INVOLVED

The statutes involved are Sections 161 and 170(a)(1) and (c), and Section 2522(a)(2) of the Internal Revenue Code of 1954.

SEC. 161. ALLOWANCE OF DEDUCTIONS.

In computing taxable income . . . there shall be allowed as deductions . . . .

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

(a) ALLOWANCE OF DEDUCTION. —

(1) GENERAL RULE. — There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

. . . .

(c) CHARITABLE CONTRIBUTION DEFINED. — For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of —

....

(2) A corporation, trust, or community chest, fund, or foundation —

(A) created or organized in the United States or in any possession thereof or under the law of the United States, any State or Territory, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

SEC. 2522. CHARITABLE AND SIMILAR GIFTS.

(a) CITIZENS OR RESIDENTS. — In computing taxable gifts for the calendar year, there shall be allowed as a deduction in the case of a citizen or resident the amount of all gifts made during such year to or for the use of —

....

(2) a corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes....

STATEMENT OF THE CASE

The petitioners are husband and wife, residents of Laurinburg, North Carolina, where for many years they have been engaged in textile and related businesses.

Edinburg Corporation is a North Carolina corporation, organized in 1939 with $50,000 capital stock which was increased to $500,000 by a common stock dividend in 1955. The petitioners owned 99 percent of the capital stock of Edinburg Corporation which was recapitalized by charter amendment on December 20, 1958, with an authorized capital of $1,000,000 divided into three classes of stock with par value of $100 per share and issued capital stock of $800,000.

In May 1949, Edwin Morgan created the Morgan Trust for Charity, Religion and Education of which the petitioners and their sons, James L. Morgan and M. Morrison Morgan, are the trustees. This trust, hereinafter referred to as the Morgan Charitable Trust, is an organization exempt under Section 101(6) of the Internal Revenue Code of 1939 and Section 501(c)(3) of the Internal Revenue Code of 1954 from income tax. Contributions to this trust are deductible for income tax purposes to the extent provided in Section 170, and for gift tax purposes as provided in Section 2522(a)(2), of the Internal Revenue Code of 1954.

On December 30, 1958, petitioners created an irrevocable trust (hereinafter referred to as the 1958 Trust) by an agreement with their two sons as trustees. The trust agreement provides:

> FIRST: Subject to the provisions hereinafter set out, the Trustees shall hold, manage, control, exchange, lease without limit as to the duration of the trust, improve,

borrow on and subject to liens, sell and convey the properties comprising said trust estate, and invest and reinvest the proceeds and keep the same invested in stocks, bonds, notes, annuity contracts or other securities and properties which they shall deem wise and suitable for the best interests of the trust estate. The Trustees may retain the shares of stock hereby transfered and presently forming a part of the corpus of this trust. The Trustees shall not be liable for any loss or depreciation of any property, real or personal, which they hold as Trustees in accordance with the discretionary power granted herein. The Trustees without license of court, are authorized to participate in any reorganization of any corporation in which they shall hold securities as Trustees hereunder and to accept the reorganization securities in exchange for the securities originally held and in all respects to act with the same freedom as if they were not trustees, provided always they act in good faith for what is believed to be for the best interest of the trust and the beneficiaries hereunder.

SECOND: The Trustees shall collect, receive and receipt for all income, gains and profits from and upon the property held in trust, and after deducting all taxes, fees and expenses paid or incurred in the administration of the trust, including court costs, commissions to the Trustees, and attorney's fees, if any, shall apply and pay over the income and also the principal of the trust estate in the following manner:

a. Up to and including December 31, 1978, the Trustees shall pay the entire net income each year to the Morgan Charitable Trust, an organized trust for charitable, religious and educational purposes created in 1949.

After 1978 the income is to be distributed to James L. Morgan and M. Morrison Morgan, sons of the petitioners, and the corpus is eventually to be distributed to their heirs.

On December 30, 1958, the petitioners contributed to the 1958 Trust 1,782 shares of Edinburg Corporation Class B nonvoting common stock. The fair market value of this stock was $190 per share or $338,580 for the 1,782 shares. On January 2, 1959, the petitioners contributed to the 1958 Trust 1,782 shares of this stock with the same fair market value of $338,580.

The petitioners determined the present value of the 20-year income interest in the 1,782 shares of stock with the fair market value of $338,580 to be $168,421.20 for their income tax returns by the use of Table II, Estate Tax Regulations, Section 20.2031-7 and for their gift tax returns by the use of Table II, Gift Tax Regulations, Section 25.2512-5.

The petitioners filed separate gift tax returns for the years 1958 and 1959 in which each reported one-half ($84,210.60) of the value of the gift to charity and claimed for each year an exclusion of $3,000 and a charitable deduction of $81,210.60. The respondent determined gift tax deficiencies for 1958 and 1959 on the ground that the exclusion (of $3,000) was not allowable and that the gifts were not deductible.

The petitioners reported charitable contributions of $198,725.08 in their joint income tax return for 1958 and $188,854.15 for 1959; each of these amounts included the $168,421.20 present value of the charitable contribution. Because of the thirty percent limitation on charitable contributions, the petitioners claimed deductions for contributions of only $78,460.51 in 1958 and $55,095.86 in 1959. The respondent determined income tax deficiencies for 1958

and 1959 on the grounds that the contributions to the 1958 Trust were not deductible.

The respondent determined deficiencies in gift tax and income tax for petitioners for the calendar years 1958 and 1959 in the total amount of $145,019.30. The Tax Court sustained the respondent's determination and the Court of Appeals affirmed the decision of the Tax Court.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. The proper disposition of this case involves an important question of law and the administration of our tax laws which should be settled by this Court.

2. The Tax Court has departed so far from the accepted and usual course of judicial proceedings and the United States Court of Appeals for the Fourth Circuit has so far sanctioned such a departure as to call for an exercise of this Court's power of supervision.

3. Although there is no other decision by a Circuit Court of Appeals involving the issue in the Morgan case, notice of appeal to the United States Court of Appeals for the Tenth Circuit has been filed in a case which was decided in favor of the taxpayer on the same issue.

ARGUMENT AMPLYFYING REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

The proper disposition of this case involves an important question of law and the administration of our tax laws which should be settled by this Court.

Insofar as this case is concerned, the pertinent statutes and regulations dealing with income tax deductions and

with the gift tax deductions are substantially the same in that taxpayers are allowed deductions for charitable contributions in computing taxable net income and in computing taxable gifts. The fair market value of the stock given to the trust for the benefit of charity was stipulated to be $677,160. The present value of the right to receive all of the income from the trust *res* was determined by the use of actuarial tables as prescribed by the respondent. Such value was used in computing the petitioners' deductible contributions for income tax and in computing the gift tax. The courts below disallowed the deductions on the grounds that the assets placed in trust consist of stock in a corporation controlled by the donor and the trustees and remaindermen are members of the donor's faimly. The lower courts concluded that ". . . charity may not receive the beneficial enjoyment of the interest" (App. 54) and that ". . . the income interest is not susceptible of valuation." (App. 55.)

May the respondent, in his interpretation and application of Sections 170 and 2522 of the Internal Revenue Code of 1954, deny the deduction of substantial contributions made in good faith for the benefit of a recognized charity simply because the donors controlled the corporation, the stock of which was given to a trust whose trustees are the sons of the donors? This question may be answered by considering the more basic and important question, whether the Congress of the United States or the Treasury Department shall make laws with regard to the collection of revenue.

In 1950 the Ways and Means Committee of the House of Representatives proposed an addition to Chapter 38 of the Internal Revenue Code of 1939 which would have done what the respondent now seeks to accomplish by unwarranted administrative and judicial legislation. In rejecting

the proposed Section 3810, the Senate Finance Committee, in S. REP. NO. 2375, 81st Cong., 2d Sess. (1950), said:

> Also under the House bill deductions for charitable contributions would be denied where the contributions consist of stock in a corporation controlled by the donor and his family and are given to an organization or trust which the donor and his family control. These provisions are omitted entirely in your committee's bill. [p. 27.]
>
> ....
>
> (E) ELIMINATION OF HOUSE PROVISION PREVENTING THE USE OF TRUSTS AND FOUNDATIONS TO RETAIN CONTROL OF A FAMILY BUSINESS.
>
> The House bill provided that no charitable deduction would be allowed to a contributor for income, estate, and gift tax purposes if both of the following conditions were present:
>
> (1) The contributor, or members of his family, have voting control of the organization to which the contribution is made, and
>
> (2) The contribution consists of stock in a corporation in which the contributor together with members of his family control 50 percent or more of the voting stock or 50 percent or more of the total stock, counting the stock held by tax-exempt organizations which the family control.
>
> ....
>
> Your committee has rejected this provision entirely.

The House report expressed the view that denial of deductions in such cases would simply be a recognition of the fact that where such control exists no completed gift for which a deduction should be granted has been

made. In the opinion of your committee this overlooks the fact that the donor or his family must use the property set aside in the foundation or trust for charitable, etc., purposes rather than for personal purposes.

The view was also expressed in the House report that as a result of allowing these deductions there was avoidance of income, estate, and gift-tax deductions. Outweighing this in the view of your committee is the fact that if these deductions are not allowed still larger funds would be lost to private charity. [pp. 38-39.]

The petitioners claimed deductions for charitable contributions of stock in a corporation controlled by the donor and his family which they gave to a trust controlled by their family. This is the exact situation to which Congress has previously directed its attention with the result that Congress has refused to say that such contributions are nondeductible.

Article I, Section I of the Constitution of the United States vests all legislative powers in Congress. Neither the Treasury Department, by regulation or administrative edict, nor the courts, by judicial decision, have authority to do what Congress has refused to do in the situation now before this Court.

The legislative history of the amendments to Section 170 of the Internal Revenue Code of 1954 clearly demonstrates that Congress has given careful consideration to proposed restrictions on charitable gifts. Reversionary interests and remainders to related persons were considered in 1954 and in 1957. In 1957, the Committee on Ways and Means considered and recommended an amendment to section 170(b)(1) commenting, in part, as follows:

It now appears, however, that section 170(b)(1)(D) does not completely block the opportunity for the double

benefit which led to the enactment of this provision. *It is understood that a practice has developed of transferring property in trust for a term of years with the income going to a charity and a remainder at the end of the term going to a close relative of the grantor (such as his child).* In this situation *under existing law, the grantor receives the benefit of excluding the trust income from his income under section 673, but because the children receive the remainder instead of the taxpayer, section 170(b)(1)(D) does not prevent the grantor from taking a charitable deduction for the value of the income interest.* This double benefit accrues in these cases despite the fact that the income-producing property is retained in the family group. [Emphasis added.]

As a result, your committee's bill adds a new subparagraph to section 170(b)(1) which includes in the definition of "grantor," for purposes of section 170(b)(1)(D) the spouse of the grantor, his ancestors and his lineal descendants and also corporations, trusts, etc., which are controlled by these individuals. [H. R. REP. NO. 775, 85th Cong., 1st Sess., 1958-3 CUM. BULL. 819.]

When the House Bill was considered by the Committee on Finance of the Senate, the proposed section 9 was stricken and on pages 116 and 117 of S. REP. NO. 1983, 85th Cong., 2d Sess. (1958), the action was explained as follows:

Your committee is of the opinion that if the House provision were to be enacted it would severely limit the creation of short-term charitable trusts. This is true because grantors would hesitate to set up such trusts where the corpus did not revert to members of their family. In fact, the creation of such a trust for charity under the House bill would not result in any benefit to the grantor which he could not obtain by giving the property directly

to members of his family without the income being set aside for an intervening period, for one of the specified charitable purposes. This is the result of eliminating a charitable contribution deduction in such cases since the property given to members of his family would in any case be excludable from his income whether this was accomplished by setting up an irrevocable trust or by giving the property directly to members of his family. Your committee believes that the situation where the corpus of a charitable trust reverts to a member of the family of the grantor is substantially different from the case where the grantor himself has not irrevocably parted with all the interest in the property.

As a result, your committee has amended the House bill to strike section 9, relating to remainders to related persons in the case of charitable trusts. Thus, a charitable contribution deduction will not be denied with respect to an amount set up in trust where the remainder eventually is to go to relatives of the taxpayer.

The House amendment was deleted and the House agreed to the deletion. CONFERENCE REP. NO. 2632, 85th Cong., 2d Sess., 19-20 (1958).

The Treasury Department itself recognizes that the law is not currently as stated by the Tax Court and affirmed by the United States Court of Appeals for the Fourth Circuit. Treasury Department Release No. D-1494, February 9, 1965, deals with private charitable foundations and recommends the following:

Donors have frequently transferred to private foundations stock of corporations over which the donor maintains control. The resulting relationships among the foundation, corporation, and donor have serious undesirable consequences which require correction. Similar prob-

lems arise when a donor contributes an interest in an unincorporated business, or an undivided interest in property, in which he or related parties continue to have substantial rights. In all of these situations, there is substantial likelihood that private interest will be preferred at the expense of charity. Indeed each of the three major abuses discussed thus far may be presented in acute form here. *The problems here are sufficiently intensified, complex, and possessed of novel ramifications to require a special remedy.*

To provide such a remedy, *the Treasury Department recommends the adoption of legislation which, for gifts made in the future, would recognize that the transfer of an interest in a family corporation or other controlled property lacks the finality which should characterize a deductible charitable contribution.* Under this recommendation, where the donor and related parties maintain control of a business or other property after the contribution of an interest in it to a private foundation, no income tax deduction would be permitted for the gift until (a) the foundation disposes of the contributed asset, (b) the foundation devotes the property to active charitable operations, or (c) donor control over the business or property terminates. [Emphasis added.]

If the law were as stated by the Tax Court and the United States Court of Appeals for the Fourth Circuit and the deduction for the contributions in question not allowable, there would be no need for the Treasury Department to seek additional legislation with regard to this exact situation. This Court has held that, in case of doubt, taxing statutes are to be construed most strongly against the government and in favor of the taxpayer. *Schwab v. Doyle,* 258 U. S. 529 (1922). In *Helvering v. Stockholm Enskilda Bank,* 293

U. S. 84 (1934), it appears that congressional intent is controlling in construing tax statutes.

As in the case of *Commissioner v. Acker,* 361 U. S. 87, 93 (1959), "The questioned regulation must, therefore, be regarded as no more than an attempted addition to the statute of something which is not there." This Court has said:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. [*Gould v. Gould,* 245 U. S. 151, 153 (1917).]
>
> The provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers. [*Bowers v. New York & Albany Lighterage Co.,* 273 U. S. 346, 350 (1927).]
>
> [S]tatutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. [*United States v. Merriam,* 263 U. S. 179, 187 (1923).]

Within the last twelve months, this Court has dealt with some of the problems dealing with charitable foundations. The language of this Court in the case of *Commissioner v. Brown,* 380 U. S. 563 (1965) is applicable to the instant request for review of the *Morgan* case by this Court. In commenting on the legislative history of the sections of the Internal Revenue Code involved in the *Brown* case, this Court noted that the Treasury Department, in 1963, pro-

posed certain changes in the law in hearings before the Committee on Ways and Means of the House of Representatives. Congress did not adopt the changes suggested by the Treasury Department and the nature of the proposed amendment was thought to be significant by this Court. This Court said:

> . . . if the Commissioner's approach is intended as a limitation upon the tax treatment of sales generally, it represents a considerable invasion of current capital gains policy, a matter which we think is the business of Congress, not ours.
>
> The problems involved in the purchase of a going business by a tax exempt organization have been considered and dealt with by Congress. Likewise, it has given its attention to various kinds of transactions involving the payment of the agreed purchase price for property from the future earnings of the property itself. In both situations it has responded, if at all, with precise provisions of narrow application. We consequently deem it wise to "leave to the Congress the fashioning of a rule which, in any event, must have wide ramifications." [380 U. S. at 579.]

On at least three occasions since 1950, Congress has considered amendments to the sections under consideration in the *Morgan* case. In 1950, the precise question presented by petitioners was presented to Congress and the response was a complete rejection of any such provision. In addition, in 1954 and 1957 when reversionary gifts and remainder interests were dealt with, Congress refused to enact laws prohibiting what petitioners in the instant case have done. We respectfully submit that this Court should emphasize again that legislation is the province of the Congress.

II

The Tax Court has departed so far from the accepted and usual course of judicial proceedings and the United States Court of Appeals for the Fourth Circuit has so far sanctioned such a departure as to call for an exercise of this Court's power of supervision.

On brief and in oral argument before the Tax Court and the Court of Appeals, the petitioners relied heavily upon the legislative history and the clear meaning of the statutes. Both the Tax Court and the Court of Appeals failed to comment in any fashion upon the legislative history of the sections in question despite the holding of this Court that the legislative history of an act reveals Congressional purpose. *Commissioner v. Bilder*, 369 U. S. 499 (1962). The courts below brushed aside the legislative history of Congressional rejection of the respondent's request to include in the Internal Revenue Code provisions similar to the regulations the respondent and the courts have applied thus far in the *Morgan* case. Legislative materials cannot be deemed to be incompetent or irrelevant in ascertaining legislative intent. *United States v. Dickerson*, 310 U. S. 554, 562 (1940). Courts should turn to legislative history to determine Congressional intent. *Colony, Inc. v. Commissioner*, 357 U. S. 28 (1958). The administrative and legislative background of an enactment is considered in determining the intent of Congress. *United States v. Zacks*, 375 U. S. 59, 62 (1963).

By their opinions, the Tax Court and the Court of Appeals seek to add to the statute provisions that the trust instrument should have required the trustees to acquire income-producing securities or otherwise insure an income to the trust in the event no dividends were received on the

stock which was the subject of the gift. Such language fails to recognize the implicit terms of the trust agreement itself which provided that *all* income would be paid to charity each year and that the trustees had the power to sell the assets of the trust and reinvest the proceeds. The fact that trustees are under a legal obligation to act, in their fiduciary capacity, for the best interests of all beneficiaries was ignored by the courts below.

Not only have the courts below ignored Congressional intent as specifically set forth in legislative history, but they have failed to cite any case law in support of their decisions. Exactly three cases were cited in the opinions of the courts below. *Ithaca Trust Co. v. United States,* 279 U. S. 151 (1929), was cited for the proposition that the valuation of the gift is to be determined from the facts known at the time the gift was made. This is a correct citation and one with which petitioners do not disagree. The Tax Court and the Court of Appeals have erroneously relied on *Commissioner v. Sternberger's Estate,* 348 U. S. 187 (1955), which case is clearly distinguishable from the *Morgan* case. In the *Sternberger* case Mr. Justice Burton stated:

> The issue here is whether, in determining a net estate for federal estate tax purposes, a deduction may be made on account of a charitable bequest that is to take effect only if decedent's childless 27-year-old daughter dies without descendants surviving her and her mother. [*Id.* at 187-88.]

Sternberger's Estate involved a bequest subject to a condition precedent—there was no completed gift. In the case now before this Court, the gift was complete; title had vested irrevocably in the trustees for the benefit of charity. There were no conditions attached to the gift and charity was the sole beneficiary of all of the income for a period of

twenty years. No one except charity had any interest in the income for the prescribed period.

The third case relied on by the courts below was cited as *Hamm v. Commissioner,* 325 F. 2d 934 (8th Cir. 1963). The *Hamm* case was erroneously cited for a proposition not even before the Court of Appeals for the Eighth Circuit. The sole issue before the Eighth Circuit was the per share valuation of the stock in question.

The petitioners respectfully submit that this Court should take jurisdiction of this case and exercise its powers of supervision over the lower courts which have: engaged in judicial legislation by ignoring Congressional intent; ignored the law as laid down by this Court with regard to the interpretation of statutes; and attempted to decide important issues without citation of any applicable law.

III

Although there is no other decision by a Circuit Court of Appeals involving the issue in the Morgan case, notice of appeal to the United States Court of Appeals for the Tenth Circuit has been filed in a case which was decided in favor of the taxpayer on the same issue.

The *Morgan* case is the first case to be decided in a United States Court of Appeals involving the issue of the deductibility of a gift of stock in a closely held corporation to a trust or to a charitable foundation where the donor retains control of the corporation whose stock is given and members of the donor's family are the trustees of the trust or charity. However, *United States v. Gates,* —F. Supp. —, 65-2 USTC ¶9654 (D.C. Colo. 1965), involved exactly the same issue present in the *Morgan* case. In the *Gates* case, a

jury decided in favor of the deductibility of certain transfers in trust under circumstances very similar to those in *Morgan*. On November 29, 1965, the United States was granted an extension of time for filing a designation of the record and docketing the record of appeal to the United States Court of Appeals for the Tenth Circuit. In the *Gates* case, the United States has designated the entire record for the appeal to the Tenth Circuit and has until February 16, 1966, to docket the record on appeal.

The petitioners will be unduly prejudiced if this petition is denied and the respondent is allowed to appeal a decision of the Tenth Circuit affirming the District Court in the *Gates* case.

CONCLUSION

In misapplying sections 170 and 2522, the Court of Appeals has raised fundamental issues concerning the scope of these significant statutes. Only this Court can settle those issues. For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

RICHARD E. THIGPEN
RICHARD E. THIGPEN, JR.
ROBERT L. HINES

900 North Carolina National
Bank Building
Charlotte, North Carolina 28202

Counsel for Petitioners

OPINION

Filed and Entered November 12, 1965.

United States Court of Appeals

FOR THE FOURTH CIRCUIT

RECEIVED
1966
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 9966.

Elise McK. Morgan, Edwin Morgan,
Edwin and Elise McK. Morgan,
Petitioners,

versus

Commissioner of Internal Revenue,
Respondent.

ON PETITION TO REVIEW THE DECISIONS OF THE TAX COURT OF THE UNITED STATES.

(Argued November 2, 1965. Decided November 12, 1965.)

Before BOREMAN, BRYAN and J. SPENCER BELL, Circuit Judges.

PER CURIAM:

We affirm on the opinion of the Tax Court.*

Affirmed.

---

*42 T.C. 1080 (1964).

United States Court of Appeals

FOR THE FOURTH CIRCUIT

RECEIVED
FEB 16 1966
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 9966.

Elise McK. Morgan, Edwin Morgan,
Edwin and Elise McK. Morgan,
Petitioners,

versus

Commissioner of Internal Revenue,
Respondent.

ON PETITION TO REVIEW THE DECISIONS OF THE TAX COURT OF THE UNITED STATES.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decisions of the said Tax Court of the United States, in this cause, be, and the same are hereby, affirmed.

November 5, 1965

HERBERT L. BOREMAN
United States Circuit Judge.

Filed Nov. 12, 1965, Maurice S. Dean, Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1000

ELISE McK. MORGAN AND EDWIN MORGAN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question is whether petitioners (husband and wife) are entitled to deductions for gifts to charity. Petitioners owned 99% of the voting stock of the Edinburg Corporation and also 99% of the corporation's nonvoting common stock. In December 1958 and January 1959 they transferred all of their nonvoting common stock in the corporation to their two sons as trustees. Under the trust agreement the trustees were to pay any income from the property to a family charitable foundation for 20 years; thereafter the income, and eventually the principal, was payable to petitioners' sons or their heirs.

213-595—66

Petitioners claimed a charitable deduction for both income and gift tax purposes for the present value of the right to receive the income from the trust property for 20 years. The Commissioner disallowed the claimed deductions. The Tax Court upheld the Commissioner, explaining that the charitable trust's income was wholly dependent upon whether or not the corporation chose to declare any dividends on its nonvoting common stock, and that since that matter was completely within the control of the petitioners (who owned 99% of its voting stock), there was no certainty that the charitable trust would ever receive anything. The Tax Court also concluded that under these circumstances the charity's interest in the stock could not be valued. (Pet. App. 45–55) The Fourth Circuit affirmed *per curiam* (Pet. App. 77).

The holding below is clearly correct. The Treasury Regulations, as well as this Court's opinion in *Commissioner* v. *Sternberger's Estate,* 348 U.S. 187, disallow any charitable deduction where, under the circumstances, it is not certain that charity will ever receive anything. Here petitioners' ownership of 99% of the corporation's voting stock gave them the power to decide whether or not the corporation would pay any dividends during the 20 years that the corporation's nonvoting common stock was being held for the benefit of the charitable foundation. Indeed, as the Tax Court recognized, the Treasury Regula-

tions expressly deny a deduction in this precise situation.[1]

The decision below is correct, and there is no conflicting appellate decision. No further review is warranted.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
MELVA M. GRANEY,
Attorney.

APRIL 1966.

---

[1] Treas. Reg. § 1.170–1(e) provides in part:

> * * * The deduction is not allowed in the case of a transfer in trust conveying a present interest in income if by reason of all the conditions and circumstances surrounding the transfer it appears that the charity may not receive the beneficial enjoyment of the interest. For example, assume that assets placed in trust consist of stock in a corporation the fiscal policies of which are controlled by the donor and his family, that the trustees and remaindermen are likewise members of the donor's family, and that the governing instrument contains no adequate guarantee of the requisite income to the charitable organization. Under such circumstances, no deduction will be allowed. * * *

U.S. GOVERNMENT PRINTING OFFICE:1966